(6)

Supreme Court, U.S.
FILED
MAR 24 1987
JOSEPH F. SPANIOL, JR.

No. 86-49

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, ET AL.,
PETITIONERS

v.

KENTUCKY PUBLIC SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

RICHARD J. LAZARUS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor

JOHN N. ESTES III
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

---

34 P

QUESTION PRESENTED

Whether a federal court should abstain from adjudicating a claim, brought by a public utility against a state public utility commission, that the state commission is unlawfully refusing to honor terms filed with or fixed by the Federal Energy Regulatory Commission for the interstate sale of electric power at wholesale, in violation of the "filed rate doctrine."

TABLE OF CONTENTS

	Page
Statement	1
A. The Federal Power Act and the filed rate doctrine	2
B. Proceedings below in No. 86-49	3
C. *NOPSI*, No. 86-546	9
Discussion	16
Conclusion	29

TABLE OF AUTHORITIES

Cases:

American Electric Power Service Corp.:	
28 F.E.R.C. ¶ 61,228 (1984)	5
32 F.E.R.C. ¶ 61,363 (1985)	7
AEP Generating Co.:	
29 F.E.R.C. ¶ 61,002 (1984)	5, 7
29 F.E.R.C. ¶ 61,246 (1984)	7
32 F.E.R.C. ¶ 61,364 (1985)	7
36 F.E.R.C. ¶ 61,226 (1986)	8, 24
37 F.E.R.C. ¶ 61,044 (1986)	9
38 F.E.R.C. ¶ 61,243 (1987)	9, 24
Alabama Public Service Comm'n v. *Southern Ry.*, 341 U.S. 341 (1951)	17
Aluminum Co. of America v. *Utilities Comm'n*, 713 F.2d 1024 (1983), cert. denied, 465 U.S. 1052 (1984)	21
Appalachian Power Co. v. *Public Service Comm'n*, 614 F. Supp. 64 (S.D. W.Va. 1985), aff'd, 770 F.2d 159 (4th Cir. 1985), on remand, 630 F. Supp. 656 (S.D. W.Va. 1986), aff'd, No. 86-2540 (4th Cir. Mar. 4, 1987)	18, 21
Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943)	6, 16
Burke v. *Barnes*, No. 85-781 (Jan. 14, 1987)	29
Colorado Interstate Gas Co. v. *FPC*, 324 U.S. 581 (1945)	20

Cases—Continued: Page

Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976) 17, 25
England v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964) 18, 25
Gibson v. *Berryhill*, 411 U.S. 564 (1973) 20
Hagans v. *Lavine*, 415 U.S. 528 (1974) 19
Hastings v. *Selby Oil*, 319 U.S. 348 (1943) 17
Hawaii Housing Authority v. *Midkiff*, 467 U.S. 229 (1984) 20
Huffman v. *Pursue, Ltd.*, 420 U.S. 592 (1975) ..18, 24, 28
Juidice v. *Vail*, 430 U.S. 327 (1977) 18
Kaiser Steel Corp. v. *W.S. Ranch Co.*, 391 U.S. 593 (1968) 17
Kentucky Power Co.:
36 F.E.R.C. ¶ 61,227 (1986) 8. 24
37 F.E.R.C. ¶ 63,015 (1986) 24
Kentucky West Virginia Gas Co. v. *Pennsylvania Public Utility Comm'n*, 791 F.2d 1111 (3d Cir. 1986) 20, 21
Lake Carriers' Ass'n v. *MacMullan*, 406 U.S. 498 (1972) 22
Louisiana Power & Light Co. v. *Louisiana Public Service Comm'n*, 377 So.2d 1023 (La. 1979) 26
Louisiana Power & Light Co. v. *Louisiana Public Service Comm'n*, No. 292,026 (19th Jud. Dist., Parish of East Baton Rouge, La., Oct. 9, 1985) .. 10
McNeese v. *Board of Education*, 373 U.S. 668 (1963) 17
Middlesex County Ethics Comm. v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982) 18, 20, 28
Middle South Energy, Inc. v. *The Council of New Orleans*, No. 85-5273 (E.D. La. Dec. 18, 1986) .. 14, 28
Middle South Energy, Inc. v. *Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), cert. denied, No. 85-895 (Jan. 27, 1986) 10, 18-19, 20, 21
Middle South Energy, Inc., 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425 (1985), aff'd *sub nom. Mississippi Industries* v. *FERC*, 808 F.2d 1525 (D.C. Cir. 1987) 10, 18, 19, 25, 27

Cases—Continued: Page

Mississippi v. *Mississippi Public Service Comm'n*, No. 56,762 (Miss. Sup. Ct. Feb. 25, 1987) 10
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) 3
Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1 (1983) 25
Nantahala Power & Light Co. v. *Thornburg*, No. 85-568 (June 17, 1986) 1, 3, 16, 25
Narragansett Electric Co. v. *Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), cert. denied, 435 U.S. 972 (1978) 25-26
NOPSI v. *City of New Orleans*, 800 F.2d 488 (5th Cir. 1986) 15
Ohio Civil Rights Comm'n v. *Dayton Christian School*, No. 85-488 (June 27, 1986) 18, 20
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 20
Public Utilities Comm'n v. *United Fuel Gas Co.*, 317 U.S. 456 (1943) 27, 28
Silverman v. *Barry*, 727 F.2d 1121 (D.C. Cir. 1984) 18
Trainor v. *Hernandez*, 431 U.S. 434 1977) 18
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 19
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 29
Velsicol Chemical Corp. v. *United States*, 435 U.S. 942 (1978) 29
Western Air Lines v. *Board of Equalization*, No. 85-732 (Feb. 24, 1987) 19
Younger v. *Harris*, 401 U.S. 37 (1971) 6, 16, 18
Zablocki v. *Redhail*, 434 U.S. 374 (1978) 17, 18

Statutes and rules:

Federal Power Act, 16 U.S.C. 824 *et seq.* 1, 2
16 U.S.C. 824d 4
16 U.S.C. 824d(a) 2
16 U.S.C. 824d(c) 2
16 U.S.C. 824d(d) 2
16 U.S.C. 824d(e) 2
16 U.S.C. 824e 3, 4

Statutes and rules—Continued: Page

Johnson Act, 28 U.S.C. 1342 ..... 6, 14
Natural Gas Act, 15 U.S.C. 717 *et seq.* 21
Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.* 21
Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq.* 3, 9
New Orleans, La., City Council, Resolution:
No. M-85-326 (July 25, 1985) 11
No. R-85-296 (May 23, 1985) 11
No. R-85-346A (July 17, 1985) 11
No. R-85-373 (June 27, 1985) 11
No. R-85-423 (July 17, 1985) 11, 27
No. R-85-466 (Aug. 8, 1985) 27
No. R-85-526 (Sept. 5, 1985) 12, 26
No. R-85-635 (Oct. 10, 1985) 12, 14, 26
No. R-85-636 (Oct. 17, 1985) 14, 27
No. R-86-112 (Mar. 20, 1986) 15, 28

Miscellaneous:
Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968) 19
New Orleans Public Service Inc.; Middle South Utilities Inc.; Proposal To Issue and Sell First Mortgage Bonds and Preferred Stock; Exception from Competitive Bidding, 50 Fed. Reg. 32669 (1985) 13
17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (2d ed. 1978) 25

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-49

AMERICAN ELECTRIC POWER COMPANY, ET AL.,
PETITIONERS

v.

KENTUCKY PUBLIC SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

This case presents the question whether a federal court should abstain from hearing a claim that a state public utility commission is violating the Federal Power Act, 16 U.S.C. 824 *et seq.*, by preventing a public utility from reflecting in retail electric rates certain wholesale costs provided in agreements filed with the Federal Energy Regulatory Commission. Petitioners base their preemption claim on the "filed rate doctrine," under which a state commission is bound to honor interstate wholesale rates for the sale of electric energy that have been filed with or fixed by the Commission (see *Nantahala Power & Light Co.* v. *Thornburg*, No. 85-568 (June 17, 1986),

slip op. 8). As explained in a memorandum we filed with this Court on November 6, 1986, in another case pending on a petition for a writ of certiorari, *New Orleans Public Service, Inc.* v. *City of New Orleans*, No. 86-546 (*NOPSI*), the legal issue raised in this case (No. 86-49) (*AEP*) is similar to that raised in *NOPSI*.[1] For this reason, we concluded that it would be appropriate while expressing our views in response to the Court's invitation in No. 86-49 also to address which, if either, of the two cases presents the question in an appropriate posture for the Court's review. Accordingly, the facts of both cases are set out separately following a brief review of the relevant statutory framework.

A. The Federal Power Act And The Filed Rate Doctrine

The Federal Power Act, 16 U.S.C. 824 *et seq.*, gives the Federal Energy Regulatory Commission exclusive regulatory authority over the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce. FERC is responsible for ensuring that all rates or charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy in interstate commerce are "just and reasonable" (16 U.S.C. 824d(a)). Public utilities are required to file with FERC schedules setting forth their rates and charges within its jurisdiction (16 U.S.C. 824d(c)), and when a public utility seeks to change a rate or charge within FERC's jurisdiction, the utility must file with FERC a new schedule that explains the changes and their effective dates (16 U.S.C. 824d(d)). FERC may hold a hearing on the lawfulness of the filed rate or charge and, pending its decision, may suspend the filed rate or charge for up to five months. FERC may require the public utility to refund, with interest, the excess amounts received should the rate go into effect and subsequently be deemed unlawful (16 U.S.C. 824d(e)). If

[1] That memorandum was served upon all parties in both cases.

FERC determines that any rate or charge collected by any public utility is unlawful, FERC is authorized to determine and to fix prospectively a "just and reasonable" rate or charge (16 U.S.C. 824e).

Under the "filed rate doctrine" established in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), a public utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission [FERC] and not even a court can authorize commerce in the commodity on other terms" (*id.* at 251). One generally accepted consequence of the filed rate doctrine, explained by this Court in *Nantahala*, is that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price" (slip op. 11). This follows from the fact that "[o]nce FERC sets such a [wholesale] rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable" (*id.* at 13). Finally, the Court held in *Nantahala* that the filed rate doctrine "is not limited to 'rates' *per se*" (*ibid.*), but also applies to contractual allocations of power, filed with FERC, that similarly affect a utility's costs: a state utility commission "cannot substitute its own conception of what allocation of [low cost] power would have been * * * fair" (*id.* at 15).

B. Proceedings Below in No. 86-49

Petitioner American Electric Power Company, Inc. (AEP) is a fully integrated public utility holding company established under Title I of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq.* AEP owns eight operating electric utility companies, which serve consumers in seven states. Five of the eight operating companies, including Kentucky Electric Power Company, own major generating facilities and are interconnected by extra-high-voltage transmission lines, forming the AEP power pool, which allows the five member companies to exchange and to sell power among them-

selves and with outside companies. The power exchanges and sales are wholesale transactions that are governed by contracts and rate schedules subject to FERC's exclusive regulatory jurisdiction under the Federal Power Act, 16 U.S.C. 824d, 824e.

Since 1951, the general rights and responsibilities of the member companies of the AEP pool have been set forth in the "Interconnection Agreement" entered into by the companies and approved by FERC. The Interconnection Agreement provides for central coordination and dispatch of the generating capacity of the member companies and of capacity available from others. The Agreement provides for payments by those member companies that have a "capacity deficit" (*i.e.*, the company's generating capacity is less than its pro rata share of system demand for power) to those member companies that have a "capacity surplus" (*i.e.*, the company's generating capacity is greater than its pro rata share of system demand for power). The payments are designed for "deficit" members partially to compensate "surplus" members for the latters' excess capacity.

1. In 1974, Kentucky Power applied to the Kentucky Public Service Commission for a certificate of public convenience and necessity to construct a high voltage transmission line (the "Hanging Rock-Jefferson" line) at an estimated cost of $55 million (KPSC Br. in Opp. App. 3a). In 1978, Kentucky Power applied to the Kentucky Commission for permission to purchase a 15 percent ownership interest in a generating facility in Rockport, Indiana owned by another AEP member company, Indiana & Michigan Electric (I&M) (*id.* at 1a). After initially approving the purchase, the Kentucky Commission reconsidered its initial decision, reversed itself, and denied Kentucky Power's application on August 2, 1984 (*id.* at 2a). The Commission concluded that the purchase would be imprudent because Kentucky Power could meet its load obligations less expensively by purchasing power through the AEP power pool, pursuant to the Interconnection Agreement (*ibid.*).

In 1984, the AEP member companies, including Kentucky Power, filed two agreements with FERC. The first, a "Transmission Agreement," filed in March 1984, generally provides that AEP member companies in a "deficit" posture regarding investment in transmission facilities must make payments over a five-year period to those members in a "surplus" posture until each company is bearing its share of the total investment in transmission facilities (KPSC Br. in Opp. App. 3a). The second, a "Unit Power Sales Agreement," filed on August 2, 1984, anticipated the Kentucky Commission's adverse determination that same day of Kentucky Power's application to purchase 15 percent of the Rockport generating facility. Under the Unit Power Sales Agreement, Kentucky Power agreed to purchase 15 percent of that facility's output for up to twenty years (Pet. App. 15a). Kentucky Power subsequently applied to the Kentucky Commission for rate increases based on both its absorption of the costs of the Hanging Rock-Jefferson transmission line pursuant to the Transmission Agreement and its power purchase pursuant to the Unit Power Sales Agreement.

While Kentucky Power's application for a rate increase was pending before the Kentucky Commission, FERC undertook its preliminary review of both the Unit Power Sales Agreement and the Transmission Agreement. On August 21, 1984, FERC accepted the Transmission Agreement for filing, gave the Agreement an effective date of January 22, 1985, and postponed final approval of the agreement pending further review. *American Electric Power Service Corp.*, 28 F.E.R.C. ¶ 61,228 (1984). On October 1, 1984, FERC accepted the Unit Power Sales Agreement for filing and allowed it to take effect after a brief suspension period, subject to refund upon further review. *AEP Generating Co. (AEPGCo.)*, 29 F.E.R.C. ¶ 61,002. FERC then stated its preliminary view that the rates reflected in the Unit Power Sales Agreement might be unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful.

On December 4, 1984, the Kentucky Commission acted on Kentucky Power's application for a rate increase and

granted only a partial increase. The Commission concluded that Kentucky Power acted imprudently in entering into the Unit Power Sales Agreement because the cost of power under that Agreement substantially exceeded the cost of purchasing power through the Interconnection Agreement. Accordingly, the Kentucky Commission concluded, Kentucky Power's rate increase should be based on the cost of purchasing additional power through the Interconnection Agreement and not on the cost of additional power under the Unit Power Sales Agreement. Pet. App. 16a. The Kentucky Commission also granted Kentucky Power only part of the rate increase it had sought based on the costs of the Hanging Rock-Jefferson transmission line under the AEP Transmission Agreement. The Commission determined that Kentucky customers benefited from only a portion of the transmission line and therefore should pay only for their fair share. The Commission found that only 44 percent of the investment should be included in Kentucky Power's rate base and only 44 percent of the operation and maintenance expenses should be charged to retail customers. KPSC Br. in Opp. App. 4a.

2. On December 12, 1984, petitioners filed this action in federal district court. Petitioners' complaint alleged that the Federal Power Act preempts the Kentucky Commission's order because the order failed to give full effect to the Unit Power Sales Agreement and Transmission Agreement on file with FERC. Eight days after the complaint was filed in federal court, petitioner Kentucky Power filed a petition in Kentucky state court for review of the Kentucky Commission's order. The state court complaint included the same federal preemption claim.

On January 16, 1985, the federal district court dismissed petitioners' complaint (Pet. App. 15a-23a). The court held that the Johnson Act, 28 U.S.C. 1342, did not bar this suit for injunctive relief, but that federal court abstention was appropriate under *Younger* v. *Harris*, 401 U.S. 37 (1971), in deference to the parallel proceeding brought by Kentucky Power in state court, and under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), be-

cause the federal action threatened to interfere with Kentucky's "overriding interest in regulating the retail rates charged by public utilities" (Pet. App. 21a-23a).

On September 13, 1985, while this case was pending before the United States Court of Appeals for the Sixth Circuit and prior to the state court's disposition of Kentucky Power's state complaint, FERC issued two orders regarding the two agreements at issue in this case. On September 13, 1985, FERC asserted that it had exclusive authority to determine the prudence of Kentucky Power's participation in the Transmission Agreement, particularly the Agreement's provision that equalization among the members would be phased in over a five-year period rather than immediately. See *AEP Service Corp.*, 32 F.E.R.C. ¶ 61,363, at 61,818 (1985). FERC also clarified an earlier order concerning the Unit Power Sales Agreement by explaining that FERC possessed "primary jurisdiction" to interpret agreements filed with it, which meant, FERC explained, that once FERC had announced an interpretation of an agreement, a state public utility commission was bound to follow that interpretation. *AEPGCo*, 32 F.E.R.C. ¶ 61,364, at 61,821 (1985).[2] Kentucky Power responded to the clarification by filing with FERC a petition for a declaratory order as to the meaning of the Unit Power Sales Agreement and the Interconnection Agreement.

On March 21, 1986, the state court affirmed the Kentucky Commission order in all respects (KPSC Br. in

---

[2] In its October 1984 order, FERC had stated that there was "no overlap or conflict" between the KPSC's "jurisdiction to consider the appropriateness of KEPCO's acquisition of new facilities [or] power supply alternatives that might be available to KEPCO," and FERC's "independent responsibility to evaluate the reasonableness of the proposed wholesale agreements" (29 F.E.R.C. at 61,003). In November 1984, FERC clarified its October order by stressing that FERC *could* consider the prudence of KEPCO entering into the Unit Power Sales Agreement in the context of a proceeding concerning KEPCO's wholesale rates, but would not do so in this proceeding, which was confined to the narrow issue of the justness and reasonableness of this particular agreement. *AEPGCo*, 29 F.E.R.C. ¶ 61,246, at 61,501.

Opp. App. 1a-6a). The court specifically found that the Interconnection Agreement did not require Kentucky Power to buy power from the Rockport Facility but rather allowed Kentucky Power to meet its need by purchasing less costly power from the AEP power pool (*id.* at 4a). The court also ruled that the Kentucky Commission's order was within its statutory authority, not preempted by federal law, and adequately supported by the evidence (*id.* at 5a). Kentucky Power's appeal is currently pending before the Commonwealth of Kentucky Court of Appeals.

3. Three days later, the Sixth Circuit affirmed the United States district court's dismissal of petitioner's complaint (Pet. App. 1a-12a). In an unpublished per curiam opinion, the court held that *Burford* abstention was not appropriate, but that *Younger* abstention was warranted (*id.* at 1a-7a). In separate concurring opinions, however, two judges stated that abstention was appropriate under *Burford* (*id.* at 7a-12a).

4. On August 20, 1986, FERC issued one order granting petitioner AEP's request for a rehearing of FERC's October 1984 order and a second order agreeing to rule on Kentucky Power's November 1985 petition that FERC issue a declaratory order regarding Kentucky Power's rights and responsibilities to purchase power under the Interconnection Agreement and the Unit Power Sales Agreement. See *AEPGCo*, 36 F.E.R.C. ¶ 61,226 (KPSC Br. in Opp. App. 21a-27a); *Kentucky Power Co.*, 36 F.E.R.C. ¶ 61,227 (KPSC Br. in Opp. App. 7a-20a). In the first order, FERC clarified its earlier statements regarding the authority of the Kentucky Commission to interpret the meaning of the two agreements. FERC stated that it possessed exclusive authority to determine the just and reasonable allocation of costs and rates among members of an integrated interstate system. FERC also concluded that although normally justness and reasonableness may be determined by the Commission apart from prudency in terms of availability of alternative supplies, "where, as here, the transaction involves affiliated, jurisdictional utilities, which are mem-

bers of an integrated, interstate holding company * * *, the relevant issues may not be so readily segregated [and] are * * * matters most appropriately resolved by this Commission as part of its overriding authority to evaluate and implement * * * wholesale rate schedules" (KPSC Br. in Opp. App. 25a-26a). In its second order, FERC set issues concerning the meaning of the two agreements for hearing.[3]

On March 12, 1987, FERC issued its decision. *AEPGCo*, 38 F.E.R.C. ¶ 61,243. FERC determined that Kentucky Power did not have the option under the Interconnection Agreement to continue purchasing power from the pool (slip op. 13-17). According to FERC, the Interconnection Agreement obliges each participant to bear its fair share of the system-wide investment in capacity (*id.* at 11-13), and Kentucky Power therefore is obliged to purchase a portion of the output of the Rockport facility (*id.* at 13-22). FERC also concluded that the Kentucky Public Service Commission lacked jurisdiction to inquire whether Kentucky Power acted prudently in purchasing power from the Rockport facility (*id.* at 23-25).

C. *NOPSI*, No. 86-546

New Orleans Public Service, Inc. (NOPSI) is one of four operating electric utility companies which are wholly-owned subsidiaries of Middle South Utilities, Inc. (MSU), an integrated public utility holding company established, like AEP, under the Public Utility Holding Company Act, 15 U.S.C. 79 *et seq.* The other subsidiary operating companies, each of which sells electric power at retail to its own local customers, are Louisiana Power & Light (LP&L), Mississippi Power & Light (MP&L), and Arkansas Power & Light (AP&L). A generating subsidiary, Middle South Energy (MSE), was formed to own and finance two nuclear power plants, Grand Gulf 1 and 2, and to sell power from those plants to the operating companies.

---

[3] On October 22, 1986, FERC approved a settlement of all issues relating to the Unit Power Sales Agreement, except for jurisdictional issues. *AEPGCo*, 37 F.E.R.C. ¶ 61,044.

1. In June 1985, FERC approved wholesale rates for the power from Grand Gulf 1 and allocated its capacity costs and energy among the four operating companies. *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425, aff'd, *Mississippi Industries* v. *FERC*, 808 F.2d 1525 (D.C. Cir. 1987). FERC concluded that the operating companies should share in the system's total investment in nuclear capacity (four units, including Grand Gulf 1) "roughly in proportion to each company's share of system demand" (*id.* at 61,655-61,656).[4] FERC ordered the following allocation of Grand Gulf 1 costs: AP&L, 36 percent; LP&L, 14 percent; MP&L, 33 percent; and NOPSI, 17 percent (*ibid.*).[5] MSE has accordingly billed NOPSI for 17 percent of the costs ($15.5 million per month) since Grand Gulf 1 went into service on July 1, 1985 (Pet. App. A2).

---

[4] FERC's ruling rested on two factual findings. First, FERC found that "the Middle South companies constitute a highly coordinated integrated electric system," which historically had "roughly equalized" generating costs among the four operating companies (31 F.E.R.C. at 61,645, 61,654). Second, FERC found that Grand Gulf 1 was part of a reasonable system plan to diversify the fuel base by developing nuclear power to meet anticipated growth in demand (*id.* at 61,651-61,653, 61,656).

[5] The fixed costs associated with Grand Gulf 1 are substantially higher per kilowatt than the costs of other power generated by the MSU system (with the exception of one other new nuclear unit). In *Mississippi Industries*, the District of Columbia Circuit considered and rejected contentions by entities representing each of the four service areas that FERC had allocated too large a share to its utility. In addition, the right of each of the four utilities to pass through its share of the FERC allocated costs to its retail ratepayers has been challenged in state proceedings. In addition to the two proceedings giving rise to No. 86-546 (*NOPSI*), see *Mississippi* v. *Mississippi Public Service Comm'n*, No. 56,762 (Miss. Sup. Ct. Feb. 25, 1987) (MP&L) (86-546 Pet. Second Supp. Br. App. 1a-27a); *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), cert. denied, No. 85-895 (Jan. 27, 1986) (AP&L); *Louisiana Power & Light Co.* v. *Louisiana Public Service Comm'n*, No. 292,026 (19th Jud. Dist., Parish of East Baton Rouge, La., Oct. 9, 1985) (LP&L).

The City Council of New Orleans regulates NOPSI's retail rates. On May 17, 1985, NOPSI applied for a retail rate increase to reflect the Grand Gulf 1 costs that it would be required to pay under the FERC allocation (Pet. App. A37). On May 23, 1985, the Council established minimum standard filing requirements for rate applications and notified NOPSI that it must comply with these requirements (Resol. R-85-296). By letter dated June 6, 1985, NOPSI sought a waiver of the new filing requirements, which the Council denied on June 27, 1985 (Resol. R-85-373). At that time, the Council stated that it could not give consideration to NOPSI's rate relief request absent the information required by the new application requirements and invited NOPSI to make a more narrow waiver request. NOPSI made such a request, by letter dated July 5, 1985, which the Council denied on July 25, 1985 (Resol. M-85-326).

On July 17, 1985, the Council acted on NOPSI's request (dated June 5, 1985) that the Council authorize the sale of securities in the aggregate principal amount of up to $100 million (Resol. R-85-346A). The Council authorized NOPSI to issue and sell securities in the aggregate principal amount of up to $60 million, but it imposed several conditions, including that (1) NOPSI must make every reasonable effort to recover from MSE the $32 million NOPSI had advanced to MSE for Grand Gulf 1 to the extent that the amount reflects more than 17 percent of the costs of the plant, and (2) the proceeds from the issuance and sale of securities may not go to pay any obligations arising out of Grand Gulf 1. On that same day, the Council also announced a public hearing, to be held on July 25, 1985, to consider whether interim rate relief for NOPSI was warranted (Resol. R-85-423). The Council stated that the issue of interim rate relief needed to be addressed because "various factors, including questions as to the legality and prudency of the [contracts relating to Grand Gulf 1], the prudency and reasonableness of said expenses, and lack of information on certain relevant matters, prevent the Council

from either denying or granting the requested rate relief at the present time" (*ibid.*).

2. On August 2, 1985, NOPSI filed a complaint in federal district court seeking declaratory and injunctive relief, and money damages. NOPSI asked the court, inter alia, to issue preliminary and (later) permanent injunctions enjoining the Council from denying NOPSI recovery through the retail rates filed by NOPSI of its FERC-allocated share of the expenses of Grand Gulf 1, which NOPSI was required to pay on a monthly basis beginning July 1985. On August 12, 1985, the district court denied NOPSI's motion for a preliminary injunction without prejudice (Pet. App. A38). The court also directed (*ibid.*) the Council to take action by September 5, 1985, on a request to be filed by NOPSI for interim rate relief; NOPSI filed such a request on August 19, 1985, asking, inter alia, for an emergency increase in electric rates of approximately $168 million per year (reflecting full recovery of NOPSI's Grand Gulf 1 related expenses).

The Council denied the requested rate increase on September 5, 1985 (Resol. R-85-526). The Council instead froze NOPSI's rates, including its fuel adjustment level, and lifted some of the restrictions imposed by the Council in July 1985 on NOPSI's issuance of securities (*id.* at 4-14). According to the Council, the rate freeze would save NOPSI approximately $28.3 million over a 10-month period because the lower fuel costs of Grand Gulf 1 would, absent the freeze, have required a rate decrease (*id.* at 13). Finally, the Council stated that "[i]f the amount of permanent rate relief ultimately allowed is greater than the amount collected through the interim rates, [NOPSI] shall be allowed to recover those additional amounts, with interest, in the future" (*id.* at 12). The Council based its conclusion that this interim relief would be adequate to maintain NOPSI's solvency largely on its assumptions that NOPSI would omit dividend payments on common stock to MSU and would be repaid the excess payments it had made to MSE with respect to Grand Gulf 1, and that the Securities and Exchange Commission would allow NOPSI to issue $35 million in securities (*id.* at 3, 7, 9).

The Council stated that NOPSI could submit a supplemental application for emergency relief if the SEC did not approve the sale of securities (*id.* at 9).[6]

On September 16, 1985, the district court granted the Council's motion to dismiss (Pet. App. A35-A50). The court held that dismissal was appropriate both under the Johnson Act, 28 U.S.C. 1342, and under *Burford.* The court specifically rejected NOPSI's claim that "its insolvency is imminent due to the Council's refusal to grant sufficient emergency interim rate relief" (Pet. App. A46). According to the court, "the September 5th [City Council] resolution reveals that the Council is determined to assist NOPSI in maintaining a positive cash position by pursuing a number of feasible alternatives" (*ibid.*). Finally, the court stated that *Burford* abstention was appropriate because NOPSI's rate increase is a "matter[] which generate[s] local concern and demand[s] local administrative expertise" and "the actions of the Council address only retail, intrastate rates, and such actions have not directly conflicted with FERC's order" (*id.* at A48-A49).[7]

---

[6] On August 5, 1985, the Securities and Exchange Commission had reduced by more than one half the value of a securities issue proposed by NOPSI on the ground that:

> NOPSI's financial resources continue to be severely limited and its liquidity and financial condition impaired. * * * There can be no assurance that retail rate relief [for Grand Gulf 1] will be granted on an adequate basis. The timing of rate relief is becoming increasingly important since [Grand Gulf 1] went into commercial operation on July 1, 1985. In addition, NOPSI's deteriorating financial position has led to the downgrading of its first mortgage bonds and preferred stock by a national securities rating agency to a speculative grade.

New Orleans Public Service Inc.; *Middle South Utilities Inc.*; *Proposal To Issue and Sell First Mortgage Bonds and Preferred Stock*; *Exception from Competitive Bidding*, 50 Fed. Reg. 32669 (1985).

[7] On October 10, 1985, the City Council granted NOPSI's request for reconsideration of the Council's interim relief order in a few limited respects and denied the request in all other respects (Resol. R-85-635). In support of its denial, the Council mentioned that its

3. On February 14, 1986, the court of appeals reversed (Pet. App. A1-A13). The court first concluded that the Johnson Act did not apply because petitioners' request for injunctive relief rested on a "statutorily-based preemption claim" and therefore did not rest solely on the " 'repugnance of the order to the Federal Constitution,' " within the meaning of the Johnson Act (*id.* at A12 (quoting 28 U.S.C. 1342)). The court similarly concluded that *Burford* abstention was inappropriate where, as in this case, "the claim is predicated on federal preemption" (Pet. App. A13).

---

own prudence review and its challenge to FERC's determination (in the United States Court of Appeals for the District of Columbia Circuit) might decrease NOPSI's recovery (*id.* at 3). On October 11th, NOPSI filed its completed rate relief application forms consistent with the Council's new filing requirements. On October 17th, the Council announced that it would conduct a prudence investigation into NOPSI expenditures on Grand Gulf 1 and requested that NOPSI answer a lengthy series of questions posed by the Council concerning prudence (Resol. R-85-636). In describing the investigation, the Council stated that it would consider NOPSI's assessment of its need for Grand Gulf 1's capacity, its consideration of generation alternatives, its failure to diversify its fuel sources, and the extent to which its decisions were controlled by outside interests. The Council also maintained that it "[would] not seek to invalidate any of the agreements surrounding Grand Gulf 1 or to order NOPSI to pay MSE a rate other than that approved by the FERC" (*id.* at 4). On November 11, 1985, NOPSI filed a second lawsuit in federal district court in which it sought to enjoin the City Council's prudence investigation. NOPSI subsequently amended the complaint to seek an injunction or a declaratory judgment only to the extent that the Council takes any action to require NOPSI or its shareholders to absorb all or a portion of the cost of Grand Gulf 1 allocated to NOPSI by FERC. On December 18, 1986, the district court dismissed the complaint. *Middle South Energy* v. *The Council of New Orleans*, No. 85-5273 (E.D. La. Dec. 18, 1986) (Pet. Supp. Br. App. B1-B9). The court ruled, first, that NOPSI's claims were not ripe because "it is not clear whether the Council intends to proceed in a manner contrary to [this Court's decision in] *Nantahala*" (Pet. Supp. Br. App. B6). The court stressed that "there is little or no hardship to NOPSI in postponing review" (*ibid.*). The court next ruled, in the alternative, that both *Younger* and *Burford* abstention were appropriate (*id.* at B6-B8).

4. On March 20, 1986, the Council and NOPSI entered into a settlement agreement with respect to the treatment of Grand Gulf 1 costs (Resol. R-86-112). The agreement set out in detail the amounts by which NOPSI could increase its rate base annually until the costs of Grand Gulf 1 were fully recovered. Pursuant to the agreement, NOPSI also agreed permanently to absorb $51.2 million of the costs. Both sides purported to reserve all their legal rights, including the Council's right to continue to investigate prudence (see note 7, *supra*) and the possibility of municipalization,[8] and both NOPSI's and the Council's right to continue to seek judicial review of FERC's allocation order (*id.* at 11-13).

5. On June 10, 1986, the court of appeals notified the parties that it was reconsidering (on its own motion) its ruling on the abstention issue and requested briefs from the parties. On September 2, 1986, the court of appeals reversed itself on the abstention issue (Pet. App. A14-A24). The court concluded that *Burford* abstention was appropriate because "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise" (*id.* at A19). The court also held that *Younger* abstention was appropriate because there was an ongoing administrative proceeding before the Council: "NOPSI would have a full and fair opportunity to litigate its federal claim" through the state appellate process, and there were no exceptional circumstances, such as bad faith or harassment, present that rendered abstention improper (*id.* at A21-A24). Finally, the court noted that because "the Council at the time NOPSI sought injunctive relief from the district court had not yet taken any definitive action on NOPSI's May 17, 1985 rate increase application," NOPSI's claims should receive "special skepticism" (*id.* at A24 n.3).

---

[8] The Council had also been considering a municipal takeover of NOPSI as a means of avoiding Grand Gulf 1 costs. See *NOPSI* v. *City of New Orleans*, 800 F.2d 488 (5th Cir. 1986).

DISCUSSION

The petitions in *AEP* (No. 86-49) and *NOPSI* (No. 86-546) both raise an important question concerning the application of *Burford* and *Younger* abstention to a claim that the Federal Power Act bars a state public utility commission from refusing to honor a utility's power costs, under agreements filed with FERC, in setting that utility's retail rates. The decisions of the Sixth Circuit in *AEP* and the Fifth Circuit in *NOPSI*, which upheld dismissals of complaints on abstention grounds, conflict with decisions of other courts of appeals, and we believe they are incorrect. To provide a neutral federal administrative forum to resolve the often conflicting interests of different states, Congress gave FERC exclusive jurisdiction over the terms of sale of power at wholesale in interstate commerce, including the terms of agreements allocating particular power among members of an interstate utility system. A state may not exercise its jurisdiction over retail sales to prevent a utility from recovering power costs incurred pursuant to such a FERC-filed agreement. See *Nantahala Power & Light* v. *Thornburg*, No. 85-568 (June 17, 1986), slip op. 18-19. Where, as in *AEP* and *NOPSI*, the federal plaintiff claims that a state public utility commission order improperly "traps" such costs, abstention is not appropriate under either *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) or *Younger* v. *Harris*, 401 U.S. 37 (1971). The independent interest of any single state in such an inherently interstate controversy is not sufficient to justify denying the federal plaintiff the choice of a federal judicial forum.

We do not urge the Court to grant review in *AEP* to consider the abstention question. The peculiar circumstances of *AEP*, including the existence of a final decision in a parallel state court proceeding, diminish its attractiveness as a vehicle for this Court to address the abstention question. We urge the Court to grant review instead in *NOPSI*, which raises the same general legal issue in a more appropriate procedural setting, and to hold *AEP* for possible further consideration in light of the decision in *NOPSI*.

1. The decisions of the Sixth Circuit in *AEP* and of the Fifth Circuit in *NOPSI* are incorrect. Each court affirmed the district court's dismissal of the complaint on abstention grounds. The Sixth Circuit apparently relied only on *Younger* abstention,[9] while the Fifth Circuit relied on both *Burford* and *Younger* abstention. We do not believe that either *Burford* or *Younger* abstention was proper in either case.

a. *Burford* abstention is appropriate when a federal court is presented with "complex issues of state law, resolution of which would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *Zablocki* v. *Redhail*, 434 U.S. 374, 380 n.5 (1978) (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976)); see *McNeese* v. *Board of Education*, 373 U.S. 668, 673 (1963); *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593, 593-594 (1968) (per curiam); *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U.S. 341, 347 (1951); *Hastings* v. *Selby Oil*, 319 U.S. 348 (1943). Thus, this Court concluded in *Burford* that it would be best to "leave these problems of [state] law to the state court" because of the great harm to state policies that might result from federal court misinterpretation of state law concerning the development, production, and conservation of in-state oil and gas resources (319 U.S. at 332; see *id.* at 327, 329-330, 331 & n.28, 333).

No such state law or state policy concerns are present in either *AEP* or *NOPSI*. The basic issue in both cases is the scope of federal law and federal policy. There has been a congressional determination that terms for the allocation of power and costs among members of a multi-state public utility holding company should be conclusively resolved by a neutral federal administrative forum (FERC) in accordance with federal law. The question whether a particular FERC allocation must be honored

---

[9] Although the court's per curiam opinion held that *Younger* abstention was required and *Burford* abstention was not required (86-49 Pet. App. 1a-6a), two judges of the three-judge panel stated in separate concurring opinions that *Burford* abstention was required (*id.* at 7a-12a).

by a state utility commission in a particular context is itself a federal question. Any disruption of state law or policy resulting from a FERC allocation or from a decision that a state is required to honor it would be a deliberate result of the congressional scheme, and therefore *Burford* abstention is inappropriate. Cf. *Zablocki* v. *Redhail*, 434 U.S. at 379-380 n.5 ("there is of course no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy"); *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411, 415-416 (1964) ("recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law"); *Silverman* v. *Barry*, 727 F.2d 1121, 1123-1124 n.4 (D.C. Cir. 1984).

b. *Younger* abstention is also inappropriate. The most "vital consideration" prompting *Younger* abstention is the "notion of comity, that is * * * the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways" (401 U.S. at 44). See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools*, No. 85-488 (June 27, 1986), slip op. 6; *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982); *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 601 (1975). The notion of comity loses much of its force, however, where, as in both *AEP* and *NOPSI*, the interests of several states are at odds because of their participation in a multistate "common pool," in which a decision by the institutions of any one state in favor of its citizens has or is at least likely to have a corresponding direct adverse effect on citizens of the other participating states. See *Mississippi Industries* v. *FERC*, 808 F.2d at 1548-1549; *Appalachian Power Co.* v. *Public Service Comm'n*, No. 86-2540 (4th Cir. Mar. 4, 1987), slip op. 15-17; *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*,

772 F.2d 404, 416-417 (8th Cir. 1985); see generally, Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).[10] Unlike the federal claims at issue in *Younger* and its progeny, the claims in such inherently interstate disputes are not readily susceptible to resolution by leaving states "free to perform their separate functions in their separate ways."

We do not mean to suggest that merely because the issue is federal preemption, abstention is always inappropriate; state tribunals are of course generally obliged to evaluate claims that federal law has preemptive effect. But Congress gave FERC exclusive jurisdiction to regulate interstate wholesale rates precisely because such matters involve inherent conflicts between the interests of different states and localities. Under those circumstances, the considerations underlying *Younger* abstention, particularly the notion of comity, do not have substantial force. Plaintiffs in such inherently interstate disputes, such as the petitioners in *AEP* and *NOPSI*, should not be deprived of their choice of a federal judicial forum to hear their federal preemption claim. Cf. *Western Air Lines* v. *Board of Equalization*, No. 85-732 (Feb. 24, 1987), slip op. 6 ("The general principle that * * * the meaning of words in a federal statute is a question of federal law has especial force when the purpose of the federal statute is to eliminate discriminatory state treatment."); *Hagans* v. *Lavine*, 415 U.S. 528, 530 (1974) (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729 (1966) (" 'the federal courts are particularly appropriate bodies for the application of preemption principles' ").[11]

---

[10] The common pool may consist of shared benefits, such as the low-cost power available to the utilities under the Interconnection Agreement in *AEP*, or of shared burdens, such as the investment costs associated with the "catastrophically uneconomical" Grand Gulf 1 nuclear power plant in *NOPSI* (*Mississippi Industries* v. *FERC*, 808 F.2d at 1528 (86-546 Pet. Supp. Br. 7)).

[11] *Younger* abstention is also inappropriate in *NOPSI* because the ongoing proceedings before the City Council are not (at least not entirely) " 'judicial in nature' *from the outset.*" *Ohio Civil*

2. Review of the abstention issue is warranted because the issue is important and there is a conflict in the circuits concerning whether abstention is required in these circumstances.

a. To date, five courts of appeals have addressed the issue whether abstention is warranted in the context of a federal preemption claim based on the "filed rate doctrine." The decisions reflect widely differing views. The Sixth and Fifth Circuits agree that *Younger* abstention is appropriate (see 86-49 Pet. App. 6a-7a; 86-546 Pet. App. A21-A24), although apparently only the Fifth Circuit believes that *Burford* abstention is generally appropriate (86-546 Pet. App. A19; see note 9, *supra*). The third and Eighth Circuits have rejected both *Burford* and *Younger* abstention in the context of preemption claims similar to those raised in *AEP* and in *NOPSI*. See *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 791 F.2d 1111 (3d Cir. 1986); *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), cert. denied, No. 85-895 (Jan. 27, 1986). Indeed, the preemption claim in *Middle South Energy, Inc.*, like the preemption claim in *NOPSI*, arose out of FERC's allocation of the costs of the Grand Gulf 1 nuclear power facility; it involved the efforts of a state public service commission to shield the citizens of Arkansas from absorbing AP&L's FERC-allocated share of those costs. The Eighth Circuit in *Middle*

Rights Comm'n v. *Dayton Christian Schools*, slip op. 7 (emphasis added) (quoting *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. at 433-434); see *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 237-239 (1984). The City Council is a popularly elected legislative body. When setting rates, its proceedings are not judicial; they are "essentially a legislative function." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945); see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968). Moreover, the Council is also, inter alia, evaluating possible condemnation of NOPSI. See note 8, *supra*. It may not be appropriate to presume that in this multistate dispute, the Council can provide the unbiased state decisionmaking forum upon which *Younger* abstention is predicated. Cf. *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973).

South Energy, Inc., unlike the Fifth Circuit in *NOPSI*, however, held that neither *Burford* nor *Younger* abstention was required because the plaintiffs were claiming that federal law preempted the ongoing state proceeding itself (772 F.2d at 417).[12]

Finally, two Fourth Circuit decisions, both also involving the abstention issue raised in the context of a preemption claim based on the filed rate doctrine, further illustrate the scope of the current circuit conflict. In *Aluminum Co. of America* v. *Utilities Comm'n*, 713 F.2d 1024, 1030 (1983), cert. denied, 465 U.S. 1052 (1984), the Fourth Circuit upheld abstention on *Burford* grounds after concluding that evaluation of plaintiff's claim—that the state commission's establishment of retail, intrastate rates conflicted with FERC-approved wholesale interstate rates—would require detailed factual inquiry. The court of appeals suggested, however, that abstention would not be appropriate in a case where the conflict between state and federal law was direct and clear (*ibid.*). Presumably based upon that caveat, the Fourth Circuit more recently affirmed a district court's denial of both *Younger* and *Burford* abstention in the context of a preemption claim more akin to that present in *NOPSI* and *AEP*. See *Appalachian Power Co.* v. *Public Service Comm'n*, 614 F.Supp. 64 (S.D. W.Va.), aff'd, 770 F.2d 159 (4th Cir. 1985), on remand, 630 F.Supp. 656 (S.D. W.Va. 1986), aff'd, No. 86-2540 (Mar. 4, 1987). In *Appalachian Power*, the utility had challenged

---

[12] In *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n, supra*, the Third Circuit considered a public utility's claim that the federal Natural Gas Act, 15 U.S.C. 717 *et seq.* and the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, preempted the state public service commission's authority to refuse the utility's request to pass through increased costs reflected in interstate tariffs filed with and approved by FERC. The court declined *Burford* abstention on the ground that the preemption claim did not present an essentially local issue (791 F.2d at 1116), and rejected *Younger* abstention largely because the ongoing state proceeding implicated important federal interests as well as state interests (*id.* at 1116-1117).

the state public service commission's refusal to authorize the recovery of costs reflected in the same Transmission Agreement at issue in *AEP* until the utility submitted the Agreement to the commission for its study and ultimately its approval.[13]

b. We also share petitioners' view that the abstention issue is important. The plethora of lower court decisions involving the same abstention issue—and sometimes even involving overlapping factual circumstances as in *NOPSI* and *Middle South Energy, Inc.*, and as in *AEP* and *Appalachian Power Co.*—is no mere happenstance. During the last several decades utilities in neighboring states have increasingly affiliated and entered into joint financing and power sharing arrangements to construct the more massive power production facilities necessary to meet predicted increases in energy demand. Construction cost overruns, sometimes of catastrophic dimensions, and lower than predicted energy demand, however, have severely strained those arrangements and produced the interstate disputes reflected in these cases. The establishment of a fair and expeditious mechanism for the resolution of these disputes, including a more settled understanding of when federal court intervention should

---

[13] Although respondents in *AEP* do not deny the existence of a conflict in the circuits, respondents in *NOPSI* argue (86-546 Br. in Opp. 22-24) that the differing court of appeals decisions simply reflect the different circumstances of each case and the appropriateness of case-by-case review. We share respondents' view that there is, of course, no per se rule against abstention in a federal preemption case. See, *e.g.*, *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 511-512 (1972). We also agree that the propriety of abstention depends on the nature of the particular preemption claim at issue. In our view, however, the various court of appeals decisions amply reveal a clear circuit conflict on the important issue whether abstention is appropriate in the context of a preemption claim based on the filed rate doctrine. In addition, petitioners cannot avoid the conflict by claiming that those cases "in which the court refused to abstain * * * involved a direct, facial conflict" (86-546 Br. in Opp. 23 n.29) because both *AEP* and *NOPSI* include such facial challenges (see pages 24, 25-27 & note 14, *infra*), yet the Sixth and Fifth Circuits directed abstention.

be permitted, is plainly important and would be furthered by this Court's review.

Resolution of the abstention issue is, moreover, especially important to a fair resolution of these interstate disputes. As *NOPSI* illustrates, a utility's liability for wholesale costs may be immediate and ongoing, and a delay in passing those costs through in retail rates will often have consequences that are irreparable; apart from immediate cash flow problems and uncertainties that may threaten bankruptcy, impede securities offerings, and force compromise settlements (see page 15, *supra*), it is neither feasible nor lawful in most jurisdictions (including Louisiana, see note 17, *infra*) to charge "catch-up" retail rates once a retail increase is finally permitted. Delay in the decisionmaking process therefore often permanently traps costs borne by the utility. Hence, federal policy may be frustrated by lengthy state proceedings. Because abstention may contribute to this result by adding to the delay, the issue whether the policy concerns underlying either *Burford* or *Younger* require abstention in these circumstances is particularly significant.

3. Whether this Court should grant review in *AEP*, in *NOPSI*, in both, or in neither, is a more difficult question. Both *AEP* and *NOPSI* present the abstention issue that we believe warrants this Court's review, but in both cases (particularly *AEP*) the issue is blemished by procedural problems. On balance, we are persuaded that the Court should grant review in *NOPSI*, which better presents the issue. The petition in *AEP* should not be denied, but should be held pending disposition of *NOPSI*. Similar problems are likely to encumber future candidates for this Court's review in this area and the abstention issue is sufficiently concrete in *NOPSI*, and too important, to let slip this opportunity for review.

a. *AEP* is not an attractive candidate for review for two principal reasons. First, the preemption issue was not sharply delineated either when the petitioners brought the case in the first instance or when the lower courts ruled on abstention. FERC only more recently clarified

its views concerning the proper role of the Kentucky Commission in reviewing the Interconnection Agreement and the Unit Power Sales Agreement and FERC only recently interpreted for itself the relevant provisions of the two Agreements. See *AEPGCo*, 38 F.E.R.C. ¶ 61,243 (1987); *Kentucky Power Co.*, 37 F.E.R.C. ¶ 63,015 (1986); *Kentucky Power Co.*, 36 F.E.R.C. ¶ 61,227 (1986) (KPSC Br. in Opp. App. 7a-20a); *AEPGCo*, 36 F.E.R.C. ¶ 61,226 (1986) (KPSC Br. in Opp. App. 21a-27a); pages 7-9, *supra*. The conflict between the Kentucky Commission's order and FERC's authority therefore was not clear when the lower courts decided to abstain, which, at the very least, diminishes the conflict the case presents with those court of appeals decisions that reject abstention in the face of a direct, facial conflict between state regulatory action and federal law.[14]

In addition, the Court's opportunity to reach the abstention issue in *AEP* is threatened because Kentucky Power also initiated a parallel state judicial proceeding that has since resulted in a judgment (see KPSC Br. in Opp. App. 1a-6a). As a result, the abstention issue is now further obscured in *AEP* by respondents' claim that res judicata now precludes federal court reconsideration of the preemption claims. Whatever the merits of respondents' reliance on res judicata, it is a "difficult" issue to avoid (see *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 607-608 & n.19),[15] and we are reluctant to recommend

---

[14] Petitioners in *AEP* may suggest that, apart from their preemption claim in connection with the Unit Power Sales Agreement, the Transmission Agreement filed with FERC also gave them rights (unobscured by the problems discussed in the text) that were violated by the Kentucky Commission's order. However, even if shifting the focus to the Transmission Agreement, which was barely discussed by the court of appeals (see 86-49 Pet. App. 2a n.1), provides a firmer preemption argument, it does not avoid our other principal concern with *AEP*—the effect of the parallel state proceeding—and, hence, does not affect our judgment that this Court should simply hold *AEP* pending review of *NOPSI*.

[15] Whether petitioners may rely on Kentucky Power's apparent effort to reserve the federal issues from state court consideration

that this Court grant review when we cannot be confident that the Court will have the opportunity to address the important issue whether abstention is required.[16]

b. Although *NOPSI* is not wholly free from procedural problems, we believe the Court should grant review in *NOPSI* because the abstention issue is sufficiently concrete and the circumstances of the case illustrate particularly well the competing policy concerns present in these abstention cases.

No parallel state court proceeding obscures the abstention issue in *NOPSI* and the underlying federal preemption claim is clear. In *NOPSI*, unlike *AEP*, the utility's request for rate relief derived from a final FERC decision: FERC had issued its final allocation determination with respect to a fair allocation of the costs of Grand Gulf 1. See *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425 (1985), aff'd, *Mississippi Industries Inc.* v. *FERC*, 808 F.2d 1525 (D.C. Cir. 1987). NOPSI's claim under federal law therefore was clear from the outset: the New Orleans City Council was obliged to respect FERC's determination of NOPSI's share of the costs of Grand Gulf 1, and to authorize retail rates that would prevent "trapping of [those] costs" (*Nantahala Power & Light Co.* v. *Thornburg*, slip op. 17). See *Narragansett Electric Co.* v. *Burke*, 119

---

pursuant to this Court's decision in *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) is not clear. This Court established the *England* procedure in the context of *Pullman* abstention, in which, unlike either *Burford* or *Younger* abstention, the federal lawsuit is stayed and is not dismissed. See *id.* at 415 n.5; 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4245, at 490-491 (2d ed. 1978).

[16] The initiation of the parallel state judicial proceeding by Kentucky Power, while understandable, also injects comity considerations into *AEP* not present in *NOPSI* (see *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976)).

R.I. 559, 381 A.2d 1358 (1977), cert. denied, 435 U.S. 972 (1978).

The record in *NOPSI* suggests that the City Council nonetheless resisted its obligation to treat FERC-allocated expenses as reasonable operating costs and instead launched an inquiry into the "legality and prudency" of the Grand Gulf 1 contracts that it had no authority to conduct. Instead of allowing NOPSI an immediate pass-through of its costs, it provided NOPSI with "interim relief" which, at best, kept NOPSI solvent from a cash standpoint and, at worst, threatened NOPSI with bankruptcy. The Council invited NOPSI to remain solvent by issuing securities but also undermined that option by preventing NOPSI from immediately recovering substantial costs (see pages 12-13 & note 6, *supra*). The City Council's decision effectively denied NOPSI full recovery of its share of the Grand Gulf 1 costs—approximately $15.5 million per month—for at least 10 months, pending the Council's investigation, contrary to *Nantahala*'s prohibition on the "trapping" of FERC approved costs.[17]

---

[17] While the Council formally stated that "[i]f the amount of permanent rate relief ultimately allowed is greater than amount collected through the interim rates, [NOPSI] shall be allowed to recover those additional amounts, with interest, in the future" (Resol. R-85-526, at 12 (Sept. 5, 1985)), that promise would appear to be an empty one because the City Council appears not to have auhority to make that guarantee. The Louisiana Supreme Court in 1979 rejected a utility's effort to recover for past expenses on the ground that such retroactive cost recovery was unlawful in Louisiana because it had not been expressly authorized by statute or by the state constitution. See *Louisiana Power & Light Co.* v. *Louisiana Public Service Comm'n*, 377 So. 2d 1023, 1027-1029 (La. 1979). The Council also denied NOPSI's request for assurances that the costs would be recovered in future rates; NOPSI apparently needed those assurances to avoid treating the cost deferrals as "losses" under generally accepted accounting principles. See Resol. R-85-635 (Oct. 10, 1985). One stated ground for the Council's negative determination was the possibility that the Council might later conclude that recovery was inappropriate because the costs had been imprudently incurred (*id.* at 3).

The district court abstained in the face of NOPSI's preemption challenge to the City Council's actions, including its denial of full recovery at least during a 10 month investigation. In our view, on the facts alleged, the Council's action clearly conflicted with the filed rate doctrine and, hence, for the reasons previously discussed (see pages 17-19, *supra*), *Burford* or *Younger* abstention was improper. As reflected in the Council's original explanation for denying pass-through in July 1985 (see Resol. R-85-423 (July 17, 1985)) and again in August 1985 (see Resol. R-85-466 (Aug. 8, 1985), and in its subsequent formal announcement of a lengthy prudence investigation in October 1985 (see Resol. R-85-636 (Oct. 17, 1985)), the Council's stated purpose was to investigate whether NOPSI acted prudently in incurring its allocated share of the Grand Gulf 1 expenses. But that was a matter within FERC's exclusive jurisdiction,[18] and, indeed, the City Council had participated in the determination both before FERC and in the District of Columbia Circuit on review of the FERC decision. For this reason, the City Council could not legitimately deny NOPSI's request for recovery of its FERC allocated costs while the Council undertook a 10 month prudence investigation. Cf. *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. 456, 468 (1943)).

Respondents now claim (86-546 Br. in Opp. 10-13) for the first time in this Court that a partial settlement entered into by the parties in March 1986, almost six

---

[18] FERC specifically found that all decisions regarding the planning and construction of Grand Gulf 1 were made by the Middle South System as a whole and that the individual operating companies, such as NOPSI, had no "autonomy" in the planning and construction process (31 F.E.R.C. at 61,649-61,651). FERC's finding precludes any investigation by the City Council into the prudency of NOPSI's participation. The Council's sole remedy was to seek review of FERC's decision before the United States Court of Appeals for the District of Columbia Circuit, which recently upheld FERC's decision in a case to which the City of New Orleans was a party. See *Mississippi Industries* v. *FERC*, 808 F.2d 1525, (D.C. Cir. 1987).

months before the decision of the court of appeals, renders the case moot. We disagree. NOPSI's complaint challenged the City Council's authority to deny pass-through of NOPSI's Grand Gulf 1 costs, which necessarily included a challenge to the Council's authority to deny recovery on prudence grounds, and under the partial settlement the Council expressly reserved the right to decrease NOPSI's recovery based on the results of the Council's prudence investigation. That prudence investigation is still underway and therefore the issue of its lawfulness under federal law, including whether the Council may further decrease NOPSI's recovery on prudence grounds,[19] is very much a live controversy. Hence, the abstention issue presented in *NOPSI* is not moot.[20]

---

[19] Under the partial settlement NOPSI has already agreed to absorb $51.2 million of the costs of Grand Gulf 1 (see Resol. R-86-112 (Mar. 20, 1986)). Thus, to a certain extent, the City Council has already achieved the "trapping of costs" prohibited by this Court's decision in *Nantahala.*

[20] That the prudence investigation was formally initiated after the complaint was filed and is the subject of a second complaint filed by NOPSI, recently dismissed by the district court on ripeness and on both *Younger* and *Burford* abstention grounds (see *Middle South Energy* v. *The Council of New Orleans*, No. 85-5273 (E.D. La. Dec. 18, 1986) (Pet. Supp. Br. App. B1-B9); see note 7, *supra*), does not support a different result. The Council's denial of an immediate rate increase, and announcement of its intention to examine the prudence of the Grand Gulf 1 costs, preceded the first injunction complaint, which is the subject of the present petition. Moreover, it is plainly permissible for the Court to consider events occurring subsequent to the filing of the original complaint and the district court's decision in determining whether the original complaint still presents a live controversy and in determining the current contours of that controversy. See *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. at 437; *id.* at 438-439 (Marshall, J., dissenting); see also *Huffman* v. *Pursue, Ltd.*, 420 U.S. at 612; *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U.S. at 466. We see no reason to suppose that a different rule should obtain merely because the subsequent event also happens to be relevant to a later-filed and somewhat overlapping complaint.

Respondents further claim (86-546 Br. in Opp. 13 n.13) that the Court should simply deny the writ of certiorari on mootness grounds. Although, as discussed in the text, we do not believe

CONCLUSION

The petition for a writ of certiorari in *NOPSI*, No. 86-546, should be granted and the petition in *AEP*, No. 86-49, should be held pending this Court's decision in *NOPSI*.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

RICHARD J. LAZARUS
Assistant to the Solicitor General

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor

JOHN N. ESTES III
Attorney
Federal Energy Regulatory Commission

MARCH 1987

---

that *NOPSI* is moot, a denial of certiorari would not be appropriate even if the case were moot. Instead, if the Court concludes that *NOPSI* is moot, the Court should grant certiorari and remand the case to the Fifth Circuit with instructions to vacate the judgment on mootness grounds. See *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). Respondents' reliance (86-546 Br. in Opp. 13 n.13), on *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978) for support of their contrary view is misplaced because in this case, unlike *Velsicol*, review would be justified in the absence of mootness and therefore a denial of certiorari would not be appropriate.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40264